Jo-Del, Inc. *and* Tri-State Building and Construction Trades Council, AFL–CIO. Cases 9–CA–34992 and 9–RC–16862

August 24, 1998

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

The issues presented here are whether the judge correctly found that the Respondent committed violations of Section 8(a)(1) and (3) of the Act and engaged in objectionable conduct.[1] The Board has considered the decision and the record in light of the exceptions and brief, has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders the Respondent, Jo-Del, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, to take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Mail a copy of the attached notice marked 'Appendix'[6] to all current employees and former employees employed by the Respondent at any time since April 15, 1997. Such notice shall be mailed to the last known address of each of the employees above. Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region."

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, concurring in part, dissenting in part.

I agree with the judge that the election should be set aside and a new election directed.[1] I find that the Respondent engaged in objectionable conduct at a mandatory employee meeting held days before the mail-ballot election. At that meeting, the Respondent's owner showed employees a blank sheet of paper and announced "this is what your union contract will be." I agree with the judge that, by this conduct, the Respondent interfered with the election by informing employees, during the critical period, that a union contract would contain nothing and that it was therefore futile for them to seek union representation. See generally *Adam Wholesalers*, 322 NLRB 313, 321–322 (1996); *Americold Services,* 323 NLRB 1095 (1997).

For the reasons stated by the judge, I also find that the Respondent engaged in objectionable conduct and violated Section 8(a)(3) when, in mid-April 1997, it reassigned employee Adkins to the penthouse to hang sheetrock by himself. Contrary to the judge, however, I do not find the evidence establishes that the May 9 statements of the Respondent's owner Reidel to Adkins violated Section 8(a)(1) or interfered with the election. Reidel spoke on the heels of Adkins' testimony against Reidel in another unfair labor practice proceeding. He therefore said that he wanted a witness present to prevent Adkins from misrepresenting his words. There was no threat involved. In these circumstances, I find the conduct to be neither unlawful nor objectionable.

Nor do I agree with the judge that Reidel's further statement was unlawful or objectionable. Reidel said that he had received reports that Adkins had not done much work that week (which Adkins denied). In my view, this statement did not amount to an unlawful threat that the Respondent would take "unspecified reprisals" against Adkins for testifying in the earlier unfair labor practice proceedings. In essence there was no threat at all, there were no reprisals mentioned (specified or unspecified), and there was no reference to NLRB proceedings. One has to make three unsupported inferences to come to the result reached by my colleagues. I would not do so.

Engrid Emerson Vaughan, Esq., for the General Counsel.

[1] On November 14, 1997, Administrative Law Judge Margaret Kern issued the attached decision. The Respondent filed exceptions and a supporting brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In the absence of exceptions, we adopt, pro forma, the judge's recommendation to dismiss the complaint allegation that the Respondent imposed more onerous working conditions on Timothy Adkins in mid-April because he gave an affidavit to the Board.

The judge referred to a prior decision by an administrative law judge involving the Respondent in this case. Since the judge's decision issued in this case, the Board has adopted the judge's decision in the prior proceeding. *Jo-Del Inc*., 324 NLRB 1239 (1997).

[4] In the remedy section of the judge's decision, she recommended requiring the Respondent to mail the Board's remedial notice to all bargaining unit employees who were employed at any of its jobsites since the date of the Respondent's initial unfair labor practice. The actual language of the judge's recommended Order, however, did not contain this unconditional notice mailing requirement. We note that the election in this case was conducted by mail ballot because of the Respondent's multiple jobsites. It is likely that the work has been completed on some of these jobsites, and that the employees may no longer work for the Respondent. In these circumstances, the mailing of notices is the most appropriate means to ensure that all the Respondent's potentially affected employees are informed of our decision. See, e.g., *3E Co.,* 313 NLRB 12 fn. 2 (1993), enfd. 26 F.3d 1 (1st Cir. 1994). We shall therefore modify the recommended Order to include the notice-mailing requirement.

[1] I also agree with the judge and my colleagues that, under the circumstances of this case, the Respondent should be required to mail the Board's remedial notice to unit employees.

Rick Holroyd, Esq., for the Respondent.
Lafe C. Chafin, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This consolidated proceeding was tried before me in Huntington, West Virginia, on October 16, 1997.[1] The complaint which issued on August 21, is based on unfair labor practice charges filed on June 5 and August 15 by the Tri-State Building and Construction Trades Council, AFL–CIO (the Union) against Jo-Del, Inc. (the Respondent). Objections to a mail-ballot election which was conducted from May 5 to May 21 were filed on May 29. By order dated September 8, these proceedings were consolidated for hearing.

The complaint alleges that in April, Respondent imposed more onerous working conditions on Timothy Adkins, and on May 9, threatened Adkins with unspecified reprisals because Adkins had engaged in activities on behalf of the Union, and because Adkins had testified at an unfair labor practice hearing on May 6.[2] Respondent denies these allegations.

Three objections to the election are also before me for consideration. The first two objections track the allegations of the complaint. The third objection is based on a statement made by Respondent's president during a speech to employees on May 1.

For the reasons set forth here, I find that Respondent violated Section 8(a)(1) and (3) of the Act by imposing more onerous working conditions on Timothy Adkins and by threatening him. I further find that Respondent engaged in objectionable conduct by its commission of these unfair labor practices and by indicating to employees that it would be futile for them to select the Union as their bargaining representative, all of which acts occurred during the critical period. For all of these reasons, the election should be set aside.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

A. Background

Respondent is engaged in construction contracting in the Huntington, West Virginia area. In the latter months of 1996, the Union filed a series of unfair labor practices against Respondent, and a complaint issued on January 7. A hearing was held before Administrative Law Judge George Carson II on May 6 and 7, at which Adkins testified in the presence of Jeffrey B. Riedel, Respondent's president. Judge Carson issued a decision on July 31 and found, inter alia, that Respondent had unlawfully transferred Adkins from one construction site to another on July 24, 1996, because of his activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.[3]

On March 17, the Union filed a petition, and on April 9, a Decision and Direction of Election was issued by the Regional Director for Region 9 in the following appropriate unit:

> All construction employees employed by the Employer who work at or out of its Huntington, West Virginia facility, excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

On April 24 and 25, notices of election were mailed to Respondent by the Regional Director. On May 5, the ballots were mailed, and a secret mail-ballot election was conducted from May 5 to 21. Upon the conclusion of the election, a tally of ballots was prepared which disclosed that there were approximately 74 eligible voters, of whom 29 cast votes for the Union, 30 cast votes against the Union, and 5 cast challenged ballots. On May 28, the Respondent and the Union each filed timely objections to conduct affecting the results of the election.

The challenged ballots were resolved and on June 6, a revised tally of ballots was prepared which disclosed that 31 votes were cast for the Union, and 31 votes were cast against the Union. Thereafter, Respondent withdrew its objections to the election.

B. Assignment of More Onerous Working Conditions

As more fully set forth in Judge Carson's decision, Adkins was transferred from a jobsite in Lewisburg to the Greenbrier College jobsite (Greenbrier) on July 24, 1996, shortly after Adkins was observed wearing a hat with a union insignia, and after being observed talking to other employees on the jobsite. The pretextual reason given for the transfer by the project manager and by Riedel was that Adkins was observed "loafing" on the job. When Adkins first went to work at Greenbrier he performed laborer's duties, but by late November 1996, he resumed working as a carpenter.

In or about February 1997, Adkins was assigned with a partner to hang sheetrock at Greenbrier. Adkins testified that hanging sheetrock is a two person job due to the size and weight of the pieces. The smallest piece of sheetrock which Adkins handled at Greenbrier was 4 feet by 10 feet and weighed approximately 100 pounds.

In mid-April, approximately 2 weeks after the Decision and Direction of Election herein issued, Adkins was assigned to work alone in the penthouse area of Greenbrier hanging sheetrock. The penthouse was located on the top of the building, and Adkins was the only one of Respondent's employees assigned to work there. He was thus isolated from all of Respondent's other employees at Greenbrier, including 15 to 20 other carpenters. Because Adkins was not assigned a partner, he had to carry his own sheetrock pieces to the penthouse level from the floor below, and he had to cut and install the pieces by himself. According to Adkins, none of Respondent's employees has ever been required to hang sheetrock without a partner. Ben McSorley, a former carpenter supervisor for Respondent, cor-

[1] All dates are in 1997 unless otherwise indicated.

[2] At the conclusion of the hearing, the General Counsel moved to withdraw par. 5(b) of the complaint as no evidence had been introduced with respect to that allegation and the motion was granted.

[3] JD–130–97. Exceptions have been filed to Judge Carsons' decision, but have not yet been decided by the Board.

roborated Adkins' testimony Adkins asked Geoff Aikens, the job superintendent and an admitted statutory supervisor and agent, why he was being assigned to hang sheetrock by himself. Aikens responded that he had no one for Adkins to work with. On another occasion, Aikens told Adkins that no employee wanted to work with him.

Adkins worked alone in the penthouse hanging sheetrock until the second week of May. He continued to be active for the Union, and he spoke to employees about the Union before and after work and during breaks.

C. The Alleged Threat

As previously indicated, on May 6, Adkins testified pursuant to subpoena before Judge Carson, and Riedel was present in the hearing room throughout Adkins testimony.

On May 8, Riedel called Adkins at the jobsite and left a message that he had called. On May 9, Adkins went to Riedel's office to pick up his paycheck and there was a sticker on the paycheck envelope indicating that Adkins was not to leave without first speaking with Riedel. When Riedel arrived, he summoned Adkins into his office but left the door open, stating that he couldn't trust Adkins not to misrepresent what Riedel was about to say. Riedel's secretary remained just outside the door. Riedel told Adkins that he had received three reports that Adkins had not done much work that week. Adkins said he had done the same amount of work that he has always done, and Riedel was welcome to inspect his work at any time. Adkins testified that at no time that week did his immediate supervisor, Aikens, ever tell him there was a problem with his work.

The original unfair labor practice charge in the instant proceeding was filed by the Union on June 5 and served upon Respondent by regular mail on June 9. On June 12, Riedel telephoned Adkins and was irate and screaming over the phone. The first words out of his mouth were, "what is this shit?" Adkins asked Riedel what he was talking about and Riedel stated that Adkins had filed another charge. Adkins said that he had asked for a partner, but that Riedel was keeping him alone. Riedel said he had done no such thing. Adkins replied that he was not accusing Riedel of personally assigning him to work alone, but that Riedel had given the directive that he work alone.

On Friday, June 13, Adkins went to Riedel's office for his paycheck. Riedel immediately showed Adkins the copy of the unfair labor practice charge filed on June 5, and reiterated that he had never put Adkins by himself. Adkins repeated that even if Riedel did not make the assignment himself, he had the assignment made by someone else.

D. Riedel's May 1 Speech to Employees

On or about May 1, employees at Greenbrier were told that they had to remain after work to attend a meeting. Riedel came to the jobsite and made a speech to the employees during the course of which Riedel held up a blank piece of paper and said to employees that "this is what your union contract will be."

IV. ANALYSIS

A. Credibility

Respondent did not call any witnesses. The testimony of Adkins and McSorley was credible and uncontradicted, and I rely on their testimony inter alia to reach the conclusions herein.

B. Assignment of More Onerous Working Conditions

The evidence establishes that prior to Adkins' assignment in mid-April, Respondent never required its carpenters to hang sheetrock alone. Because of the weight and size of the 35 pieces, carpenters are always assigned in pairs to perform the work of carrying, cutting, and installing sheetrock. The assignment of Adkins to work alone hanging sheetrock clearly constituted disparate treatment by Respondent. The timing and duration of the assignment, coinciding with the period of time that the mail ballot election was ordered and conducted, further serves to establish that this work assignment was discriminatorily motivated. It also is clear from Judge Carsons' decision that Adkins had previously been singled out for discriminatory treatment by Respondent. I therefore find that Respondent's assignment to Adkins of these more onerous working conditions violated Section 8(a)(1) and (3) of the Act. *Wright Line,* 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I reject the General Counsel's allegation that the assignment of more onerous working conditions on Adkins was also in retaliation for his having given testimony to the Board in the form of an affidavit and/or for his having testified in the unfair labor practice proceeding. There is no evidence before me that Adkins ever gave an affidavit to the Board, and Adkins did not testify in the unfair labor practice case until May 6, approximately 3 weeks after the work assignment was made. I therefore recommend dismissal of that portion of the complaint alleging a violation of Section 8(a)(4) of the Act.

C. Threat by Riedel of Unspecified Reprisals to Adkins

Three days after testifying in an unfair labor practice case, Adkins was summoned into Riedel's office. Riedel's first comment to Adkins was that he had to leave the door open because he could not trust Adkins not to misrepresent he was about to say. The clear inference from Riedel's statement is that Adkins had made misrepresentations during his testimony in the unfair labor practice proceeding and Riedel would now only speak to Adkins in the presence of a witness. Riedel then chastised Adkins for reportedly not getting much work done that week. In view of the lack of any evidence that there had been a problem with Adkins' job performance that week, Riedel was again clearly referencing Adkins absence from work to testify in the Board proceeding. I find it not coincidental that Riedel's accusation that Adkins had fallen behind in his job assignments was similar to the excuse given by Riedel in June 1996 when he transferred Adkins to another jobsite because of his union activities. As found by Judge Carson in that case, Riedel told Adkins he was being transferred because he was caught loafing.

Accordingly, l find that Respondent threatened Adkins on May 9 with unspecified reprisals because Adkins testified before the Board in an unfair labor practice proceeding 3 days earlier in violation of Section 8(a)(1) of the Act.[4]

D. Riedel's May 1 Speech

At a mandatory meeting of unit employees on May 1, Riedel held up a blank piece of paper and announced, "this is what your union contract will be," thereby indicating to employees that their support of the Union in the upcoming election would be futile and that they would never achieve any benefit through

[4] I find it unnecessary to rely on Riedel's comments on June 12 to find that Respondent violated Sec. 8(a)(1) on May 9.

collective bargaining. Respondent's conduct, committed during the critical period, was objectionable. See *Adam Wholesalers, Inc*., 322 NLRB 313 (1996); *Fieldcrest Cannon, Inc*., 318 NLRB 1 (1995).

E. Conclusion

During the critical period Respondent violated Section 8(a)(1) and (3) by assigning to Timothy Adkins more onerous working conditions, and further violated Section 8(a)(1) by threatening Adkins with unspecified reprisals because he had testified in an unfair labor practice proceeding. These acts, without more, warrant the setting aside of the election. *Diamond Walnut Growers*, 316 NLRB 36 (1995); *Dal-Tex Optical Co*., 137 NLRB 1782 (1962).

I also find that in addition to committing unfair labor practices alleged, Respondent engaged in objectionable conduct on May 1 when Riedel held up a blank piece of paper to assembled employees and told them, in substance, that they would never achieve anything through collective bargaining and that their selection of the Union would be futile.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2 The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b)of the Act:

> All construction employees employed by the Employer who work at or out of its Huntington, West Virginia facility, excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) and (3) of the Act in mid-April 1997, by assigning more onerous working conditions to Timothy Adkins because he engaged in activities in support of the Union.

5. Respondent violated Section 8(a)(1) of the Act on May 9, 1997, by threatening Timothy Adkins with unspecified reprisals because Adkins testified in an unfair labor practice proceeding.

6. Respondent engaged in objectionable conduct by engaging in the conduct set forth above in paragraphs 4 and 5, and further, on May 1, 1997, by conveying to employees the futility of selecting the Union as their bargaining representative.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having further found that Respondent engaged in objectionable conduct during the critical period, I recommend that the election be set aside and a new election be ordered.

The General Counsel seeks a broad order in this case because it is the second time that Respondent has been found responsible for violating the Act. I decline to recommend such an order as the requirements of *Hickmott Foods*, 242 NLRB 1357 (1979), have not been met. However, I do recommend that Respondent be required to mail the notice herein to all employees in the bargaining unit who were employed by Respondent at any of its jobsites at any time since April 15, 1997.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Jo-Del, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assigning to employees more onerous terms and conditions of employment because of their support for and activities on behalf of the Tri-State Building and Construction Trades Council, AFL–CIO, or any other union.

(b) Threatening employees with unspecified reprisals because they give testimony before the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, and at all current jobsites, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 1997.

(b) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix."[7] to all employees in the following unit who were employed by the Respondent at its jobsites at any time from the onset of the unfair labor practices found in this case, to wit, April 15, 1997, until the completion of these employees' work at those jobsites:

> All construction employees employed by the Employer who work at or out of its Huntington, West Virginia facility, excluding all office clerical employees, all other employees and all professional employees guards and supervisors as defined in the Act.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted and mailed by Order of the National Labor Relations Board" shall read "Posted and mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[7] See fn. 6, above.

The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certificatlon of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election conducted by mail ballot in Case 9–RC–18862, from May 5 to 21, 1997, be set aside. A second election shall be held at such time as the Regional Director decides that the circumstances permit the free choice of a bargaining representative.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT assign to employees more onerous terms and conditions of employment because of their support for and activities on behalf of the Tri-State Building and Construction Trades Council, AFL–CIO, or any other union.

WE WILL NOT threaten employees with unspecified reprisals because they give testimony before the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

JO-DEL, INC.